Yahya bin Timbon & Ors v Kumpulan Parabena Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(A)-537–03 OF 2018
ABDUL RAHMAN SEBLI, RHODZARIAH BUJANG AND KAMALUDIN MD SAID JJCA
24 JUNE 2020

Civil Procedure — Judicial precedent — Stare decisis — Appellants appealed to Court of Appeal ('COA') against High Court's dismissal of their claim to having native customary rights over lands registered in respondent's name — Whether issues relied upon by appellants were not sustainable in view of previous Federal Court ('FC') decisions on the points raised — Whether COA bound by principle of stare decisis to follow FC's decisions and dismiss the appeal — Whether trial judge considered all the evidence and made a right decision on the facts and the law

The respondent sued the appellants for an order that they quit their occupation of two pieces of land in respect of which the respondent was the registered leaseholder. The appellants counterclaimed that they were in lawful occupation and sought declarations that they had native customary rights ('NCR') over the lands; that the leases issued to the respondent were null and void for being granted without taking their NCR into account, and an order that the respondent pay them damages for trespassing on the lands. The appellants, who claimed to be representing the interests of several other villagers occupying the lands, asserted that they had acquired the NCR from the continuous occupation and use of the lands by their ancestors from time immemorial. The appellants claimed they had not only cultivated and built their dwellings on the lands but had foraged and hunted in the forested areas for food and jungle produce and thereby had usufructuary rights. The High Court allowed the respondent's claim and dismissed the counterclaim on: (a) finding the appellants' evidence to be 'unsatisfactory and to a certain extent contradictory' especially with regard to when their ancestors first cleared the lands for occupation and the extent of the area over which NCR was claimed; (b) accepting the evidence of an assistant surveyor with the Lands and Surveys Department who testified that aerial photographs of the lands in 1951 and 1961 showed that only 1.7 hectares of the lands had been cleared and the rest were under primary forest and that even the cleared areas could have been logging tracks; and (c) finding that despite alleging fraud and non-compliance with the Sarawak Land Code ('the SLC') in the issuance of the leases to the respondent, the appellants had not sued the State Government and the Land and Surveys Department. The trial judge also found that under s 132 of the SLC, the respondent's rights as registered holder of leases over the lands were indefeasible and could not be defeated by the appellants' NCR claims. In their

instant appeal against the dismissal of the counterclaim, the appellants argued that: (i) they had successfully proven that they had NCR over the lands and that those rights had not been extinguished; (ii) the decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 ('TR Sandah') was no longer good law; and (iii) the respondent's title to the lands was defeasible.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The Federal Court's decision in *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 ('TR Nyutan') was binding on this court and militated against the granting of the reliefs claimed by the appellants in their counterclaim. *TR Nyutan* held that once title to the land had been issued, the title was indefeasible under s 132 of the Sarawak Land Code ('the SLC'). Even though the Federal Court agreed that title should not been issued over land encumbered by NCR unless the latter had been extinguished, but once the title was issued, indefeasibility set in (see para 20).

(2) With regard to the appellants' claim that they had usufructuary rights over the forested areas of the lands in question, this court was again bound by the Federal Court's decision in *TR Sandah* to reject that claim. *TR Sandah* held that the right to forage under the custom of *pemakai menoa* and *pulau galau* was not one which had force of law for it fell short of the prerequisites prescribed under s 5(2) of the SLC whereas the custom of 'temuda' (felling or clearing of virgin jungle and cultivation of same for occupation) had the force of law. The court could not decline to follow *TR Sandah* and apply the provisions of the 2018 amendment to the SLC, which added s 6A giving statutory recognition to usufructuary rights within a 'native territorial domain', because that amendment only came into force on 1 August 2019, after the instant appeal had been heard, and the amendment had no retrospective effect (see paras 11–13 & 22–24).

(3) With regard to the allegation of fraud in the issuance of the leases to the respondent, the trial judge correctly found that the appellants should have sued the Lands and Surveys Department and the Government of Sarawak. Without doing so and in the absence of those parties before the court, there was no way this issue could be fairly resolved since the said Department was the relevant authority concerned with the issuing of the leases (see para 27).

(4) It could not be said that the trial judge had come to 'a plainly wrong decision' and was guilty of no or insufficient judicial appreciation of the

evidence adduced at the trial. On the contrary, the judge had correctly considered all the evidence and found that not only was the appellants' evidence unsatisfactory, but their credibility as witnesses were suspect. For example, Mahari and Yahya had incredulously testified that the total area of the land covered by the two leases had been cleared by their ancestors; then there was Yahya's backtracking on his initial testimony that a 100-year-old jackfruit tree had supposedly been planted by his ancestor within the disputed area, while Mahari himself did not know if his ancestors had cleared the lands before or after 1958. The photographic evidence of the village graveyard and tombstones also did not corroborate the appellants' claim because the dates of death shown on the tombstones were not before, or as at, the all-important cut-off date of 1 January 1958 (see paras 16–18).

[Bahasa Malaysia summary

Responden telah menyaman pihak perayu bagi suatu perintah agar mereka berhenti dari menduduki dua keping tanah yang mana responden adalah pemegang pajakan berdaftar. Perayu membuat tuntutan balas bahawa mereka menduduki tanah dengan sah dan memohon deklarasi bahawa mereka mempunyai hak adat anak negeri ('HAAN') ke atas tanah tersebut; bahawa pajakan yang dikeluarkan kepada responden adalah tidak sah dan terbatal kerana tidak mengambilkira HAAN, dan suatu perintah agar responden membayar ganti rugi kerana menceroboh tanah tersebut. Perayu, yang mendakwa mewakili kepentingan beberapa penduduk kampung lain yang menduduki tanah tersebut, menegaskan bahawa mereka telah memperoleh HAAN dari pendudukan berterusan dan penggunaan tanah oleh nenek moyang mereka sejak dahulu lagi. Perayu mendakwa mereka bukan sahaja mengusahakan dan membina kediaman mereka di atas tanah tersebut tetapi juga mencari makan dan memburu di kawasan hutan untuk mendapatkan makanan dan hasil hutan dan dengan itu mempunyai hak penggunaan. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas tersebut: (a) dapatan bahawa keterangan perayu 'tidak memuaskan dan pada tahap tertentu adalah bertentangan' terutamanya apabila nenek moyang mereka pertama kali membersihkan tanah untuk diduduki dan luas kawasan di mana HAAN dituntut; (b) menerima keterangan penolong juruukur dengan Jabatan Tanah dan Ukur yang memberi keterangan bahawa gambar di udara tanah tersebut pada tahun 1951 dan 1961 menunjukkan bahawa hanya 1.7 hektar tanah yang telah dibersihkan dan selebihnya berada di bawah hutan simpan dan bahkan kawasan yang dibersihkan mungkin merupakan kawasan pembalakan; dan (c) dapatan bahawa walaupun terdapat dakwaan penipuan dan ketidakpatuhan terhadap Kanun Tanah Sarawak ('KTS') dalam pengeluaran pajakan kepada responden, pihak perayu tidak menyaman Kerajaan Negeri dan Jabatan Tanah dan Ukur. Hakim perbicaraan juga mendapati bahawa di bawah s 132 KTS, hak responden sebagai pemegang pajakan berdaftar di atas tanah tidak boleh disangkal dan tidak dapat

diketepikan oleh tuntutan HAAN perayu. Dalam rayuan semasa terhadap penolakan tuntutan balas, pihak perayu berpendapat bahawa: (i) mereka telah berjaya membuktikan bahawa mereka memiliki HAAN ke atas tanah tersebut dan hak-hak tersebut masih wujud; (ii) keputusan Mahkamah Persekutuan dalam *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 ('TR Sandah') tidak lagi menjadi undang-undang yang mantap; dan (iii) hak milik responden terhadap tanah tersebut boleh disangkal.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Keputusan Mahkamah Persekutuan dalam *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 ('TR Nyutan') mengikat mahkamah ini dan sependapat dalam tidak membenarkan relif yang dituntut oleh perayu dalam tuntutan balas mereka. *TR Nyutan* memutuskan bahawa setelah hakmilik tanah dikeluarkan, hak tersebut tidak dapat disangkal di bawah s 132 Kanun Tanah Sarawak ('KTS'). Walaupun Mahkamah Persekutuan setuju bahawa hakmilik tidak seharusnya dikeluarkan ke atas tanah yang dibebankan oleh HAAN kecuali yang ianya dipadamkan, tetapi setelah hakmilik tersebut dikeluarkan, ketidaksangkalan ditetapkan (lihat perenggan 20).

(2) Berkenaan dengan tuntutan pihak perayu bahawa mereka memiliki hak penggunaan terhadap kawasan hutan tanah tersebut, mahkamah ini sekali lagi terikat dengan keputusan Mahkamah Persekutuan dalam *TR Sandah* untuk menolak tuntutan tersebut. *TR Sandah* memutuskan bahawa hak untuk mencari makan di bawah adat pemakai menoa dan pulau galau bukanlah hak yang mempunyai undang-undang kerana tidak memenuhi syarat yang ditetapkan di bawah s 5(2) KTS manakala adat 'temuda' (penebangan atau pembukaan hutan dan penanaman untuk pendudukan) mempunyai kekuatan undang-undang. Mahkamah tidak dapat menolak untuk mengikuti *TR Sandah* dan mengguna pakai peruntukan pindaan 2018 KTS, yang menambahkan s 6A yang memberikan pengakuan berkanun kepada hak-hak penggunaan dalam 'domain wilayah adat', kerana pindaan tersebut hanya bermula pada 1 Ogos 2019 , setelah rayuan semasa didengar, dan pindaan tersebut tidak memberikan kesan retrospektif (lihat perenggan 11–13 & 22–24).

(3) Berkenaan dengan dakwaan penipuan dalam pengeluaran pajakan kepada responden, hakim perbicaraan dengan tepat membuat dapatan bahawa pihak perayu seharusnya menyaman Jabatan Tanah dan Ukur dan Kerajaan Sarawak. Tanpa berbuat demikian dan tanpa pihak-pihak

tersebut hadapan mahkamah, adalah mustahil bagi isu ini dapat diselesaikan secara adil kerana Jabatan tersebut adalah pihak yang wajar yang mengeluarkan pajakan tersebut (lihat perenggan 27).

(4) Ianya tidak boleh dikatakan bahawa hakim perbicaraan telah membuat 'keputusan yang jelas salah' dan bersalah kerana tidak ada atau tidak secukupnya apresiasi penghakiman terhadap keterangan yang dikemukakan semasa perbicaraan. Sebaliknya, hakim telah mempertimbangkan kesemua bukti dengan tepat dan mendapati bahawa bukan sahaja keterangan perayu tidak memuaskan, tetapi kredibiliti mereka sebagai saksi adalah diragui. Sebagai contoh, Mahari dan Yahya tanpa kredibiliti telah memberikan keterangan bahawa jumlah kawasan tanah dua pajakan tersebut telah dibersihkan oleh nenek moyang mereka; terdapat keterangan awal Yahya bahawa terdapat pokok nangka berusia 100 tahun yang ditanam oleh nenek moyangnya di kawasan yang dipertikaikan, manakala Mahari sendiri tidak pasti sama ada nenek moyang beliau telah membersihkan tanah tersebut sebelum atau selepas 1958. Bukti bergambar perkuburan di kampung dan batu nisan juga tidak menyokong tuntutan perayu kerana tarikh kematian yang ditunjukkan pada batu nisan tidak sebelum, atau pada tarikh penting pada 1 Januari 1958 (lihat perenggan 16–18).]

Cases referred to

Busing Jali v Government of Sarawak [2014] 1 LNS 623, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 583, FC (folld)

Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors [2020] 1 MLJ 612, FC (folld)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (folld)

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311, HC (folld)

Ladd v Marshall [1954] 3 All ER 745; [1954] 1 WLR 1489, CA (refd)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)

Powerscan Company Ltd v Nuctech Company Ltd & Anor [2018] MLJU 58, CA (distd)

TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77, FC (folld)

Legislation referred to

Land Code (Cap 81) ss 5, 5(2), 28, 132

Appeal from: Originating Sumons Nos MYY-24–18/10 of 2016, MYY-24–19/10 of 2016 and MYY-24–20/10 of 2016 (High Court, Miri)

Dominic Ng Kim Ho (Nurul Hidayah with him) (Dominique Ng & Assoc) for the appellant.
Tony Ling Lee Tow (Satem, Chai & Dominic Lai, Advocates) for the respondent.

Rhodzariah Bujang JCA:

[1] This appeal emanates from a decision of the learned judicial commissioner ('JC') in respect of three originating summonses filed individually by the respondent against the three appellants, which summonses were later converted into writ actions and jointly tried before His Lordship. The respondent's principal claim against the three appellants was for vacant possession of land registered under its name which the appellants contended was theirs by virtue of native customary right ('NCR') and for which the respondent must pay damages on account of their respective trespass on the said land. That counterclaim of theirs for, inter alia, the said damages as well as declaration of their aforesaid rights over the land were dismissed by the learned JC whilst the claim of the respondent was allowed. Hence the appeal before us which we dismissed on the merits but without cost.

[2] Before delving into our reasons for deciding so, we would first give a brief background of the facts upon which the claim and counterclaim were based upon. Hereinafter, the parties would be referred to as they were in the High Court except that when it is necessary to refer to the appellants individually, they would be mentioned by their first name.

ACQUISITION OF NATIVE CUSTOMARY RIGHTS

[3] The subject matter of the dispute between the parties are two pieces of land described as Lot 187 and 188, Block 10 Lambir Land District. The plaintiff at that material time was the registered owner of the said land, having been granted by the Government of Sarawak, through the Department of Land and Survey, a 60 years lease over them on 1 September 2009. The defendants on the other hand are residents of a village called Kampung Tukau Jaya (formerly known as Kampung Baluboh) which is situated on the said land and claimed, not just for themselves but also other residents of the said village that they have, through continuous occupation as well as usage of the land from time immemorial since the days of their ancestors, acquired NCR over it. Thus, they also sought a declaration that the said leases which were issued without a

prior extinguishment of their NCR was null and void. The defendants contended they have not only built their residences on the land and cultivated the land but have also foraged and hunted in the forested area on the land for their food and livelihood. Thus they have usufructuary right over part of the land covered by the said leases ('disputed land'). A B

[4] At the trial, all three defendants gave evidence in support of their NCR claims. No other fellow villagers or other witnesses were called. The learned JC had in his judgment laid out their evidence from paras 8–12 thereof and found the said evidence 'unsatisfactory and to a certain extent contradictory'. His Lordship's reasons for finding so are summarised below: C

(a) the defendants relied on a letter from the Agriculture Department dated 4 June 1951 (p 143 of the appeal record Vol 3 — Part C (amended)) addressed to nine village headmen, including one Hj Sakiria, whom the defendants claimed to be their former headman, which gave permission for the villagers to plant paddy. This document, which we would hereinafter referred to as the 1951 letter, the defendants contended is evidence of their cultivation of the land since 1951 but the learned JC rejected it as there was no evidence that this Hj Sakiria was the former headman of the defendants' village. It is to be noted that in the 1951 letter Hj Sakiria is stated to be from Luak and from its content it appears to be have been issued after a meeting was held by the said Department and the addressees; D E

(b) contradictions in the defendants' evidence as to when the land was cleared. Haslan and Mahari said they were told by their late fathers it was before the Japanese occupation but Yahya said it was after the Japanese occupation; F

(c) Yahya's evidence of the existence of a 100 years old jackfruit tree on the land was later admitted by him in cross-examination to be outside the disputed land and he was also unable to plot the position of the said tree on the map tendered by the defendants as exh D3 at the trial (see p 259 of the appeal record Vol 3 — Part C (amended)). We pause to note that the three defendants have used this map to plot the areas cleared by their ancestors — Haslan drawing a red line to indicate so but Mahari and Yahya indicated the whole two lots as their cleared area which the learned JC said was not reasonable for as noted by His Lordship the total acreage of the two lots is about 1,000 acres or 489.5 hectares; G H

(d) acceptance by the learned JC of the evidence of the plaintiff's witness, Eric Dexter Ridu (PW2) an Assistant Surveyor with the Land and Surveys Department who testified that from the aerial photographs of the land in 1951 and 1961, only 1.7 hectares of the two lots was cleared and the rest were primary forest. The cleared area, according to PW2 could be I

logging tracks. His report on the interpretation of the aerial photograph is at pp 220–227 of appeal record Vol 3 — Part C (amended); and

(e) despite the defendants' allegation of fraud in the issuance of the said leases in that there was non-compliance with the provisions of and in particular, s 28 of the Sarawak Land Code ('the Land Code') which requires the boundary of land to be surveyed before issuance of the said leases, the issuer of the land title (the Land and Survey Department) and the State Government were not sued.

[5] The learned JC's other ground for allowing the plaintiff's claim is on the legal issue of indefeasibility of title. That ground was premised on the Federal Court's decision in *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 which held that even if it was shown that NCR has been created in the manner prescribed by the Land Code, the leases issued is still indefeasible as provided under s 132 of the said Code and the rights of the lease holder is not defeated by the NCR claims.

ADDITIONAL EVIDENCE

[6] Another matter which we need to address before we proceed further is the notice of motion filed by the appellants to adduce additional evidence at the hearing before us which is bound in a bundle titled 'further supplementary record of appeal'. In the said bundle, the appellants have included the cause papers, including the exhibits and submissions which they have filed in their application for a stay of the learned JC's judgment against them. The Land Code (Amendment) Bill which was enclosed in a letter from the Secretary of the State Legislative Assembly was also included in the said bundle together with the said letter. The order granting the stay was made by the learned JC on 4 June 2018. Crucially, the bundle contains photographs of the houses of the defendants together with 61 other residents in their village as well as that of oil palms and other fruit trees planted on the disputed land. The same was objected to by learned counsel for the plaintiff which objection we upheld because obviously these are evidence (though not the said Bill) which were available but not tendered as evidence during the trial. Thus, it failed to satisfy the first requirement in the three cumulative conditions set for the reception of further evidence at the appeal stage as held in *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489, which is that the intended evidence could not have been obtained with reasonable diligence for use at the trial. The said test has been adopted and applied by our courts and we need only refer to the decision of the Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 as an example of one such case. The case of *Powerscan Company Ltd v Nuctech Company Ltd & Anor* [2018] MLJU 58 cited by learned counsel for the defendants in support of the usage of the said bundle before us, as rightly pointed out by the plaintiff's counsel, is distinguishable because according to

the facts laid out in the judgment, the material evidence sought to be adduced at the appeal stage were suppressed and this fact was only discovered after the conclusion of the High Court suits.

[7] As for the said Bill, we have no issue with it for it was also raised in the plaintiff's counsel submission before us who even included in his supplementary bundle of authority, a letter from the State Attorney General of Sarawak dated 27 December 2018 to say that the said Bill has yet to come into force. Putting that letter aside, the Bill being a pre-statutory law, it is one which we can take judicial notice of. In any event, the dismissal of the said application in our view would cause no prejudice to the defendants because there was no dispute that they, and others too, were residing on the disputed land and cultivating it, otherwise there would not be any need to file the suit to evict them from the land.

[8] The crucial question is whether theirs or rather their ancestors' occupation and usage of the land was before or after the cut-off date of 1 January 1958 as clearly provided in s 5 of the Land Code.

We would now move on to consider the merits of the appeal.

THE APPEAL

[9] Principally, the defendants rest their appeals on three grounds as canvassed in both the written and oral submissions of their counsel and these are:

(a) they have successfully proven NCR over the disputed land and this right have not been extinguished;

(b) the Federal Court decision in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 is no longer good law; and

(c) the plaintiff's title to the land is defeasible.

ESTABLISHMENT OF NCR

[10] In order to put the arguments of the parties herein in a better perspective and before delving into the merits of the appeal, it is best that we first mention that as at the date when we heard the appeal and delivered our decision, the methods upon which NCR are created as statutorily provided under s 5(2) of the Land Code are as follows:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method.

[11] However, the said Bill was passed by the State Legislative Assembly on 12 July 2018 to amend the Land Code to include a new s 6A to give the natives of Sarawak a leeway in asserting their usufructuary rights over the land, termed as native territorial domain which is defined in the amended s 2 of the Land Code Amendment Ordinance 2018 ('the Amendment Ordinance') as follows:

'native territorial domain' means an area or territory —

(a) within or conjoining or immediately adjacent to an area where native customary rights have been created by that community in accordance with section 5; and

(b) wherein members of a native community have from a date prior to 1st day of January, 1958, exercised usufructuary rights or preserved by them for such purposes;

Provided that such area or territory have not already been constituted a communal forest under Part III of the Forests Ordinance, 2015 [Cap 71];

[12] Section 6A reads:

LAND CODE (AMENDMENT)

6A Native territorial domain

(1) Any native community may, within a native territorial domain, claim usufructuary rights exercised and enjoyed by members of that community.

(2) Any claim under subsection (1) shall be made to the Superintendent in such form as may be provided by the Director with all evidence in support of such claim:

Provided always any area claimed as native territorial domain shall not exceed five hundred hectares;

(3) If the Director approves the claim, the Superintendent shall issue a native communal title, describing the area as a native territorial domain, which shall be used exclusively by the native community for agricultural purpose or such other purposes as may be approved by the Majlis Mesyuarat Kerajaan Negeri and subject to any other terms and conditions that the Director may imposed:

Provided that the native communal title shall —

(a) be issued in the name of a person or body of persons who shall hold

the native territorial domain in trust for the native community named in the native communal title in accordance with rules made hereunder;

(b) be in perpetuity; and

(c) not be assigned or transferred to any person who is not a member of the native community named therein.

(4) In the event that the Director rejects the claim, any person aggrieved by his decision may within thirty days from the date when the decision of the Director is conveyed to him, appeal to the Minister who shall consider the appeal.

(5) Where any question shall arise as to whether any person is a member of the native community named in the native communal title issued under subsection (3), the person or body of persons in whose name the native communal title is issued shall refer the same to the District Native Court for a decision, and such reference shall be instituted and dealt with in accordance with rules made under the Native Courts Ordinance, 1992 [Ord No 9/92].

(6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim.

[13] The said Bill was *gazetted* on 6 August 2018 but as at the date of the hearing of the appeal before us, it has yet to be enforced. The Amendment Ordinance only came into force on 1 August 2019 and the determination of this date was done pursuant to s 1(2) thereof which clearly states that:

(2) This Ordinance shall come into force on such date as the Minister may, by notification in the Gazette, appoint, and the Minister may appoint different dates for the coming into force of different provisions of this ordinance.

[14] Other than their collective oral evidence on the establishment of their village, cultivation and usage of the land, the defendants have, as we had mentioned earlier, tendered the 1951 letter. They have also produced as evidence the birth certificates of Hazlan (at p 144 of appeal record Part C (amended)), a fellow villager named Juita (p 145) and Juhani (p 146) which shows their respective dates of birth as 25 June 1962, 19 October 1959 and 4 October 1960 and place of birth as Kampung Sungei Baluboh and Sungai Baluboh, respectively.

[15] Also produced at the trial are official correspondences with Land and Survey Department on the villagers' application for recognition of their right and usage of the land dated 5 November 1980, 26 November 1993, 8 July 1995, 30 October 1995, 21 March 1996 and 16 May 2012 (at pp 147–151 and 153 respectively of the same appeal record) which have all been agreed as

to authenticity only. Nonetheless, given that these are official documents issued by the government (both Federal and State) we do not think there is any reason to doubt the correctness of their contents — that the above-named persons were born in the said village and there had been attempts made, since 1980, to have the defendants' village officially recognised by the State Government. Admittedly, the birth certificates tendered especially that of Juita which shows her year of birth as 1959 is quite close to the cut-off date of 1 January 1958 but still these dates still do not correspond with the said cut-off date. As for the 1951 letter, obviously that would be the best documentary evidence to show the existence of the village before the said cut-off date but unfortunately for the defendants and as held by the learned JC, there is no evidence to support that this Hj Sakiria was the headman of their village. Such corroborative evidence is required in this case because as shown in the said minute Hj Sakiria was listed as the headman of 'Luak' and para 8.1 (at p 30 of the appeal record Vol 1 — Part 4) states the location of the village graveyard as *Jalan Bakam*. The 1951 letter in fact listed one Usop as the Ketua Kampung of Bakam. Further, the undisputed evidence is that the location of the plaintiff's two leases are in *Lambir Land District*. Therefore, it behoves upon the defendants to lead evidence that *Bakam, Lambir Land District* and *Luak* are all not just part and parcel of the same area but more importantly the connection of these named places to their village.

[16] Adding to the unsatisfactory evidence adduced by the defendants which had contributed to the failure in the assertion of their claim is the learned JC's questioning of the credibility of the defendants as witnesses at the trial which we could find no good reason to disagree with. We had mentioned these evidence earlier but wish to reiterate the same again now. The first of it is the rather incredulous evidence of Mahari and Yahya, given the combined huge acreage of the land covered by the two leases that the whole acreage had been cleared by their ancestors and them. The second is Yahya's evidence where he referred to a 100 years old jackfruit tree on the disputed land being planted by his ancestor as proof of their occupation of the said land but later agreeing in cross-examination that the said tree was outside the two leases. Then there is the evidence of Mahari in cross-examination that he himself does not know if his ancestor cleared the land before 1958 or after. As was held by the Federal Court in a recent decision on NCR, to wit, *Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors* [2020] 1 MLJ 612:

> [73] *Only in a case where it has been shown to the satisfaction of the appeal tribunal that the impugned decision has been one that is plainly wrong, would the appeal tribunal weigh in and invoke its appellate power in order to right a wrong decision in plain sight. The well entrenched principle on appellate intervention of a trial court's decision has been consistently applied by the appellate courts and was reiterated by the apex Court in the case of Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. *In citing Gan Yook Chin v Lee Ing Chin* [2005] 2 MLJ 1, *the apex Court also adverted to the case of UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys*

Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363*, where it was stated that 'a plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of the evidence'*. The English House of Lords' decision in the case of *Watt v Thomas* [1947] AC 484 was cited, inter alia, in support thereof. In fact, as relatively recently as in 2014, the English Supreme Court in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600 ('the *Henderson*'s case') considered and explained the 'plainly wrong' test as follows:

> 62. Given that the extra Division correctly identified that an appellate court can interfere where it is satisfied that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached. (Emphasis added.)

[17] Applying the above principle in this appeal, we are unable to say that the learned JC had come to 'a plainly wrong decision' and was guilty of no or insufficient judicial appreciation of the evidence adduced before him at the trial. On the contrary His Lordship had, in our view correctly considered the evidence before him, though to the detriment of the defendants.

[18] As for the photographic evidence of the village graveyard and tombstones of the villagers reproduced at pp 242–251 of the appeal record Vol 3 Part C (amended), these could not be corroborative evidence of the defendant's claim because the dates of the demise shown on the tombstone were not before or as at the all-important cut-off date. On this consideration and the fact as stated earlier on the location of the graveyard at Jalan Bakam, we cannot fault the learned JC's reliance and acceptance of the evidence of Perk Sian Khiaw Soon (PW1), the plaintiffs' manager at that material time, who said the graveyard is actually outside the leases.

[19] Even if we were as equally wrong as the learned JC to consider the above issue against the defendants and to disregard the said evidence of PW2 that the cleared area was probably logging tracks which as submitted by learned counsel for the defendants was without any supporting evidence of its own, we are still unable to make a contrary finding because firstly, the burden is on the defendants to prove their NCR over the disputed land and not for the plaintiff to prove otherwise. Secondly, even if we agree that the cleared area shown on the aerial photograph represents the defendants' village, we are still prevented from giving effect to that evidence by reason of a Federal Court decision on indefeasibility of title.

A INDEFEASIBILITY OF TITLE

[20] The Federal Court decision which binds us and militates against the granting of the reliefs claimed by the defendants in their counterclaim is *TR Nyutan*'s case. It was held in the said case that once title to the land has been issued, the said title is indefeasible under s 132 of the Land Code. Even though the Federal Court agreed (in para 32 of the judgment) that it should not been issued over land encumbered with NCR unless they have been extinguished but once issued, indefeasibility of title sets in. The pertinent paras 39–41 of the judgment reads:

> [39] For the reasons adumbrated above, we propose to answer the questions of law posed in the first and second defendants' and in the interveners' appeals in the following manner: The statutory provisions under s 132 of the Sarawak Land Code pertaining to indefeasibility of title remain applicable even if it can be shown that NCR had been created over land in the manner prescribed under the Sarawak Land Code. A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after NCR was asserted. Based on the facts, indefeasibility of title of the land prevails over a NCR claim. It is not a question of whether a claim for NCR overrides indefeasibility of title. Both these legal concepts exist side by side.
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> [40] It is our judgment that a NCR claim without title should not be put on a better footing with differential treatment (*Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766). A claim for NCR and indefeasibility of title exist side by side. Based on the facts of this case, the disputed land were converted to registered entities even before the plaintiffs succeeded in their NCR claim.
>
> [41] In the absence of the vitiating factors under s 132 of the Sarawak Land Code, the first and second defendants' rights as leaseholders, and the first and second interveners as proprietors and the third intervener as chargee cannot be defeated by the plaintiffs' NCR.

[21] Learned counsel for the defendants have also referred us to the judgment in *Busing Jali v Government of Sarawak* [2014] 1 LNS 623 which declared that a lease issued without extinguishment of NCR over the alienated land was null and void. With respect, the said decision is one of the High Court and is also distinguishable on the fact in that the lease in the said case was only a provisional one, unlike those in the appeal before us. Nonetheless, we say that what the learned JC (as His Lordship then was) said in the cited case that the Land and Survey Department should make an investigation on the ground on the existence of NCR over the area identified before issuing the said lease makes perfect good sense. This, in order to avoid any further or potential dissatisfaction and trouble rising on the ground.

FORAGING AREA

[22] As stated earlier, the defendants also claimed that the other areas covered by the leases, aside from that occupied and cultivated by them and the villagers they represent, were also a place where they foraged and hunted for food and livelihood. Regrettably for the defendants, this very concept of usufructuary right over the land by the natives of Sarawak has been conclusively determined by the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1. The Federal Court held that such a usage, that is the right to forage, under the custom called *pemakai menoa dan pulau galau* (for the Ibans in that case) is not one which has force of law for it fell short of the prerequisites as provided for under the said s 5(2) of the Land Code whereas that of 'temuda' which is the custom of felling or clearing virgin jungle and cultivating the same does. This was what Raus Sharif PCA said in the majority judgment at the relevant paras 64–67 thereof:

> [64] With respect, we disagree. This is not a case where we are called upon to consider whether such a practice exists or otherwise. Rather, what is pertinent here is whether the practice which exist has any force of law. In art 160(2) of the Federal Constitution, 'law' is defined as follows:
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> > Law includes written law, the common law in so far it is in operation the Federation or any part thereof, and any custom or usage having the force of law.
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> [65] The words 'having the force of law' in art 160(2) of the Federal Constitution are highly important as these words qualify the types of customs and usages which could come under the definition of law. These important words 'having the force of law' must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.
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> [66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean 'customs which the laws of Sarawak recognise'. This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under art 160(2) of the Federal Constitution.
>
> [67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in the case of Nor Anak Nyawai wherein it was held that the native customary rights claim over land founded upon the concept of

continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of good, jungle produce etc. What is essential as recognised by our courts is the custom of 'temuda' which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.

[23] We are obviously bound by the above decision by the principle of stare decisis and in this regard the decision of the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 583 is instructive:

> [2] ... *It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability*. In *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, Mr Justice Chang Min Tat had occasion to restate the doctrine in words which are poignantly clear when he said:
>
> > It is ... necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.
>
> [3] *Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system*. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnapan & Anor v Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said:
>
> > We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this Court and of the Federal court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.
>
> [4] *The observation is but a stark reminder to judges of the importance of adhering to the doctrine*. ... (Emphasis added.)

Thus, based on the above apex court's decision, there is no way the defendants could claimed the non-cleared area covered by the said leases.

AMENDED LAW

[24] Learned counsel for the defendants urged us to take cognizance of the Amendment Ordinance which we had reproduced earlier as it in effect gives statutory recognition to this very concept of *pemakai menoa* and *pulau galau* under the term 'territorial domain'. Much as we are heartened by this

development of the law which puts to rest the thorny aspect of NCR claim in Sarawak, a glaringly obvious fact which prevented us from using it as justification not to follow the principle of stare decisis is the fact that the Amendment Ordinance has no retrospective effect. As we had stated earlier, the said Ordinance only came into effect on 1 August 2019. That being so, we could only apply the law as it exist at the time of the hearing and not after. In saying this we are guided by the Federal Court's decision in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311 which held as follows:

> [42] ...*The trite general principle is that an Act of Parliament is not intended to have a retrospective operation unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction. Another principle of statutory interpretation which applies with equal force is that legislation to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the existing law* (Thornton: *Legislative Drafting*, 4th Ed at p 135).
>
> [43] *There is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used, or unless a contrary intention appears (Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749). *In other words, there is, so to speak, a presumption that legislation speaks only as to the future* (*West v Gwynne* [1911] 2 Ch 1).
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> [44] As a necessary reminder, lest we forget, in construing a statute, it is also relevant to consider our own interpretation statute namely Act 388 in particular sub-s 19(1) which provides:
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> > 19(1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where n date is so provided, the date immediately following the date of its publication in pursuance of section 18. (Emphasis added.)
>
> [45] The requirement of the aforesaid provisions is further made clear and reinforced by sub-s 43(a) of Act 388 which states in peremptory terms that:
>
> > 43(a) A power to appoint a date on which a written law shall come into operation does not include power to appoint —
> >
> > (a) a date prior to the date on which the instrument of appointment is published; or
> >
> > (b) different dates for provisions of that law,
> >
> > unless express provisions is made in that behalf. (Emphasis added.)

In addition to these provisions, sub-s 2(1) and (3) of Act 388 are also equally relevant. It is provided as follows:

> 2(1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to —

A (a) this Act and all Acts of Parliament enacted after 18 May 1967;

...

(3) PART I shall not apply where there is —

B (a) express provision to the contrary; (Emphasis added.)

Accordingly, the fact that the Land Code has been amended has no bearing on our ultimate decision in this appeal.

C **[25]** Learned counsel for the plaintiffs also referred us to the Hansard dated 12 July 2018 at p 26 which is reproduced as Reference 11 in the defendants' bundle of authorities which provides the main objective of the Land Code (Amendment) Bill as follows:

D i. To give Native Territorial Domain the force of law;

ii. To issue Native Communal Title in perpetuity which will confer on such title a proprietary right to the Native Territorial Domain. Once such title is issued, it will be treated as any title granted under the Land Code and the proprietary interest in that title would be indefeasible by virtue Section 132 of the Land Code;

E

iii. *To resolve the problem arising from Federal Court decision in TR Nyutan case relating to provisional lease*; and

iv. To repeal provision in the Land Code Amendment Ordinance 2000 which had not come into force resulting in for example the reinstatement of Section 5(2)(f). (Emphasis added.)

F

[26] It is therefore clear, submitted learned counsel further, that the amendment to the Land Code was only to remedy the legal situation for provisional lease and not for a lease proper as in this case. We have no cause to disagree with that submission given the clear intention expressed above but not being the apex court we reiterate that we would still have to follow the principle of stare decisis and apply the law as held by the apex court which in this case, is to detriment of the defendants.

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FRAUD

[27] Finally, on the allegation of fraud in the issuance of the leases raised by the defendants, we totally agree with the learned JC that the proper parties, which were the Land and Survey Department and the Government of Sarawak were not sued and were therefore not parties before the court. Therefore, there is no way that this issue can be fairly resolved given their absence since they, in particular the said Department, was the relevant authority concerned with the issuance of the said leases.

I

[28] For the reasons given above, we have decided to affirm the decision of the learned JC and dismiss the defendants' appeal but with no order as to cost as agreed by the parties.

Appeal unanimously dismissed; High Court's decision affirmed.

Reported by Ashok Kumar